IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 288

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

ERIE RESISTOR CORPORATION and
INTERNATIONAL UNION OF ELECTRICAL, RADIO
AND MACHINE WORKERS, LOCAL 613,
AFL-CIO

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF ON BEHALF OF ERIE RESISTOR CORPORATION, RESPONDENT

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STATUTE INVOLVED

In addition to the provisions of the *National Labor Relations Act*, as amended (61 Stat. 136, 29 U.S.C. 151, et seq.), set forth in the Appendix to the Board's Brief, the provisions of Sections 10(c) and 10(e) of the Act are set forth in the Appendix hereto, *infra*, pp. 57-60.

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Board properly hold that every grant of job tenure by means of additional seniority to permanent replacements for economic strikers is *per se* a violation of Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, and so, did it properly refuse to consider or pass upon the findings of the Trial Examiner, fully supported by the record, that the employer had no unlawful discriminatory purpose whatsoever; that the employer's sole purpose was lawful; that the additional seniority policy was adopted due to compelling economic necessity; and that the employer complied in every respect with the law?

COUNTER-STATEMENT OF THE CASE

A. The Facts

Erie Resistor Corporation is a relatively small company having its principal office in Erie, Pennsylvania, where it also has a manufacturing plant. (R. 68a). At the material times it was engaged in the highly competitive business of manufacturing electronic components and molded plastic parts. Competition, including Japanese imports, was so severe that the Company could not interrupt deliveries without severe and permanent loss of its markets. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449a-451a).

The Company had dealt amicably with the International Union of Electrical, Radio and Machine Workers, Local 613, AFL-CIO, for many years, and entered into numerous written labor agreements with that Union. (R. 58a-59a, 71a-73a).

In January, 1959, at the Union's request, the Company entered into negotiations for a new contract to replace the one due to expire March 31, 1959. (R. 73a). Some twenty-one negotiating meetings were held up to March 31, 1959, and many issues were resolved, but not all of them. (R. 37a-39a, 74a-76a, 291a-296a, 233a-235a).

On March 31, 1959 the Union went on strike in support of its demands, which then included a general wage increase, limitation on subcontracting, freezing seniority for certain job incumbents, improved vacations, and assumption by the Company of certain group insurance costs. The strike was conceded to be an economic strike. (R. 3a, 37a-38a, 297a-308a, 278a-279a, 82a-84a).

Counter-Statement of the Case.

On March 31, there were about 478 bargaining unit employees at work. There were about 450 bargaining unit employees on layoff. The laid off employees had seniority, but due to the depressed state of the business they had no prospect of being recalled to work. (R. 36a, 69a-70a).

The Company operated the plant throughout the strike because it had to in order to survive. (R. 38a-39a, 419a-422a, 425a, 427a-429a, 449a-451a).

All during April the Company tried to operate using salaried personnel, clerks, engineers, managers and all other non-bargaining unit personnel. Production amounted to only 15% to 30% of that required to continue in existence. (R. 4a, 39a, 429a-430a, 409a-410a, 417a).

The biggest electronic component customer cancelled all its orders, the biggest plastics customer removed its dies and tools, and intense pressure was put on the Company by its remaining customers to resume normal deliveries. (R. 425a, 450a-451a).

Beginning April 2 the Union engaged in mass picketing and violence in an attempt to keep everyone out of the plant. This continued throughout the strike in spite of a state court injunction and ultimately resulted in conviction of the local Union president for contempt. (R. 453a, 370a-372a, 470a, 485a).

By May 3 the Company concluded it would have to hire replacements for the strikers in order to survive. By a letter dated May 3 it notified all employees of its intent to hire permanent replacements beginning May 7. (R. 4a, 39a-40a, 320a, 431a-432a; G.C. Ex. 7, R. 560a-561a).

On May 7 and 8 the Union engaged in mass picketing and violence so extensive that on one day the police closed the plant and no one could get in. These riots received prominent headlines in the only newspaper in Erie. (R. 40a, 364a-365a, 453a).

On May 11 the Company began to hire replacements. When they were hired they were told they would not be laid off or discharged at the end of the strike. This assurance was repeated when they actually came on the job. Nevertheless, many who were hired failed to report for work. (R. 4a, 40a-41a, 369a-397a, 366a, 146a-147a, 227a, 416a, 435a, 443a-444a, 343a-344a; G.C. Ex. 25, R. 574a; G.C. Ex. 26, R. 576a).

Beginning with the hiring of the first replacement on May 11, the Company, which had never ceased to meet in an attempt to settle the issues in dispute, placed on the bargaining table the problem posed by hiring of permanent replacements in the peculiar circumstances of this case.

On May 11, the day the first replacement was hired, the Company told the Union that in view of the layoff list of some 450 that already existed on March 31, when the strike began, some method would have to be worked out to enable the Company to keep its promise to the replacements that they would not lose their jobs after the strike ended. Since the Company was offering a contract with seniority, the Company suggested some form of seniority arrangement for replacements, but always offered to consider any solution to which the Union would agree. (R. 4a, 311a-312a, 226a-227a, 441a-443a, 425a, 146a-147a, 120a).

The Union, however, absolutely refused to bargain on the subject, taking the adamant stand that all replacements must be discharged and all strikers rehired, including five who had been discharged for violence and misconduct on the picket line. The Union maintained this position throughout the strike, up to and including the last day. (R. 311a-314a, 179a-180a, 222a-224a).

After reviewing the problem of getting sufficient production to preserve the plant, the meager numbers of replacements willing to brave the picket line, and the Union's flat refusal to consider or even discuss any arrangement that would result in the replacements staying on after the strike ended, the Company officials concluded that they had no choice but to develop some plan themselves. (R. 41a, 5a, 120a-122a, 343a-345a, 454a, 441a-443a, 433a-435a, 459a).

A few days before May 27, after studying the prospects of future business and the number of people on layoff, but who had seniority, the Company concluded that twenty years' seniority would be needed for anyone to have reasonable assurance of working after the strike. It therefore wrote up a program on May 27 spelling out its policy of replacing the strikers having least seniority first, and also a policy of adding twenty years to the seniority of the replacements. (R. 343a-345a, 433a-435a, 454a-456a, 120a-122a).

The Company did not immediately put the policy in effect, nor did it announce it to the public or the employees, but explained it to the Union at the negotiating meeting of May 28, while still seeking some agreement on any alternative that would permit the replacements to continue on after the strike. The Union still refused to

consider any arrangement under which the replacements could be retained. (R. 41a, 344a, 119a-120a, 117a-118a, 452a).

The Company did *not* announce on May 28 that its proposition to add twenty years to the seniority of replacements would go into effect. This was only one of the many proposals made to the Union in an effort to solve the problem. (R. 41a, 343a-345a, 119a-122a, 433a, 435a, 452a-456a).

However, the Union without authorization and presumably for its own purposes had widely publicized the so-called "20-year proposal" on radio and television on May 30 and 31. (R. 6a, 41a, 173a).

It was only after many more bargaining meetings, in which the Union adamantly refused to consider any arrangement that would allow the replacements to continue to work after the strike, that the Company, on June 10, publicly announced the reasons and need for a job assurance plan, and on June 15 posted a bulletin announcing it was thenceforth in effect. (R. 6a, 42a, 122a-124a, 436a, 452a; G.C. Ex. 6, R. 556a-559a).

After the Union broadcast the Company proposal of May 28, more replacements came to work, and the number steadily increased from then on, until by June 22 or 23 there were about 450 employees working in the plant, which was virtually a full complement. Of course, of these some 140 were clerks, managers, engineers and the like, and 58 were college students who were hired as temporary replacements during the summer vacation that began around June 1. (Resp. Ex. 12, R. 522a).

On June 24 the Union sent the Company a telegram anouncing that the strike was over, and after some brief misunderstanding, the strike ended on June 25, although no contract was signed at that time. (R. 7a, 43a, 166a, 214a-215a; G.C. Ex. 14, R. 567a; G.C. Ex. 15, R. 569a).

The 140 supervisors, clerks and engineers returned to their regular duties. The 58 college students were dismissed as promptly as strikers could be called in. All the permanent replacements continued to work, and all non-replaced strikers for whom there were jobs were called in, according to seniority, with certain minor agreed-upon exceptions. (R. 7a, 409a-410a, 411a-414a).

On July 17 the Company and the Union signed a new labor contract, and simultaneously executed a "strike settlement agreement." The strike settlement agreement settled the dispute as to the five employees who had been discharged for violence on the picket lines, leaving three discharged and reinstating two with a 30-day disciplinary layoff; provided that non-replaced strikers who were not yet called back would be considered as "bidders" for open jobs; and provided that the Company's replacement and job assurance policy—the so-called "superseniority"—would be resolved by the National Labor Relations Board and the Courts, and that it was to remain in effect pending final disposition of the matter. (R. 7a-8a, 44a, 166a, 168a-169a; G.C. Ex. 27, R. 578a).

Thereafter, plant operations increased to a high point of 442 bargaining unit employees in September, but then due to economic circumstances declined until there were only 240 in May, 1960. (R. 7a; Resp. Ex. 13, R. 523a).

Counter-Statement of the Case.

Beginning in October, numbers of employees were laid off, including some returned strikers and some replacements who had been granted the so-called "superseniority." (R. 7a, 280a-282a).

The Trial Examiner found that the Company had a lawful economic purpose and need for its actions; that there was no refusal to bargain in good faith or any evidence of discriminatory motive or attitude; and recommended dismissal of the complaint. (R. 33a-64a).

He made the following findings of fact, among others:

> "* * * there is no contention, much less evidence, that the Company was engaging in, or had engaged in, any other unfair labor practices at or about the time it announced and adopted the superseniority policy." (R. 59a).

> "* * * in the instant case there is a complete absence of the factors which the Board has relied upon as evidence of illegal employer motivation in the announcement and adoption of a superseniority policy. Nor do I find any other factors upon which a finding of illegal motivation might be predicated." (R. 59a).

> "From the evidence and findings herein, I am convinced, and find, that the 20-year seniority policy of the Company was announced and adopted for legitimate economic reasons." (R. 64a).

B. The Board's Conclusions

The Board on July 31, 1961, held notwithstanding the absence of any discriminatory motive or intent and the existence of lawful purpose and need, that the so-called superseniority for replacements was *per se* unlawful, and that the strike was converted from an economic strike to an unfair labor practice strike on May 29, when the Union had a meeting concerning the Company's proposal. (R. 3a-28a).

The Board refused to consider the evidence offered by the employer as to motive or as to the circumstances and need for what was done, and made no findings of fact on these points.[1] (R. 19a, n. 29).

C. The Decision of the Court of Appeals

Upon appeal, the United States Court of Appeals for the Third Circuit refused enforcemment on the basis of the narrow question presented by the Board's decision, saying that preferential seniority is not *per se* unlawful, but that the Board is obliged to consider the record as a whole in determining whether there was a violation of Section 8(a)(3).[2] (Circuit Court Proceedings, pp. 15-21).

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1. Under the circumstances, the only official findings before the Court are those of the Trial Examiner. His findings are part of the record and should not be ignored. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951); Cf. *N.L.R.B. v. James Thompson & Co.*, 208 F. 2d 743 (2nd Cir., 1953).

2. The alleged violation of Section 8(a)(3) was the only question before the Court. The Board had dismissed the minor, subsidiary 8(a)(5) refusal to bargain charges (R. 20a), and no independent violation of Section 8(a)(1) was alleged. (R. 81a-82a).

SUMMARY OF ARGUMENT

I. The critical issue is whether or not the National Labor Relations Board may declare that an action not expressly forbidden by the terms of the National Labor Relations Act is *per se* a violation of Sections 8(a)(1) and (3) of the Act. The particular action in question was adoption of a policy of job tenure by means of additional seniority for permanent replacements of economic strikers. The Board selected this respondent and this case as the vehicle for establishment of this *per se* doctrine, finding the respondent guilty of no unfair labor practice, no unlawful motive, and no wrongdoing of any kind absent the *per se* illegality of every policy of additional seniority, which the Board in its sweeping general prohibition calls "superseniority." Consistent with this doctrine, the Board refused to consider any defense of any nature whatsover.

II. Having outlawed all additional seniority by this means, the Board seeks to justify this administrative legislation in a series of arguments heretofore advanced in other cases and rejected by the courts. The Board argues that adoption of a policy of additional seniority foreseeably interferes with the protected activity of striking, and discourages union activity. However, it is clear that even if this be true, this does not of itself render the policy unlawful. Operating a plant during a strike or permanently replacing economic strikers necessarily interferes with the strike, yet the Board concedes that these acts are lawful, and this is well established law. *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The Board then argues that in declaring all "supersen-

iority" unlawful it is merely carrying out its function of balancing conflicting interests. A sweeping declaration that all acts of a certain type are absolutely unlawful, in the absence of an express prohibition in the Act, is not balancing of interests, but legislation. Assuming arguendo that the Board may balance conflicting interests by taking into account the facts and circumstances in each case; nevertheless if an entire class of conduct is to be outlawed, that balancing is for Congress. *National Labor Relations Board v. Truck Drivers, Local 449*, 353 U.S. 87 (1957); *National Labor Relations Board v. Insurance Agents International Union*, 361 U.S. 477 (1960). No broad rule outlawing this class of conduct is required. The principles announced by five Courts of Appeal narrowly circumscribe the use of "superseniority", and enable the Board to fully protect the legitimate interests of all concerned.

III. No principle is more firmly established than that which recognizes that the purpose or motive of the employer is of critical importance in every case involving an alleged violation of Section 8(a)(3). *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17 (1954). The Board's assertion that purpose or motive is irrelevant is necessary to its *per se* doctrine, but it is contrary to the law. While no one disputes the Board's right to draw inferences, any such inference must be based upon evidence, not upon another inference, nor does the right to draw inferences permit the Board to refuse to consider evidentiary facts rebutting its inference. In this case the Board drew no inference of unlawful motive, as it now attempts to do in its brief, but if it had, that inference must still depend entirely on its predetermination that all "superseniority" is *per se* unlawful.

Summary of Argument.

The evidence shows and the Trial Examiner found that the policy of additional seniority in this case was adopted solely for a lawful, non-discriminatory purpose. The Board abused its functions when it refused to consider the facts and the Trial Examiner's findings. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951).

IV. If Erie Resistor is to be judged on the facts in its own case, and not required to defend superseniority as a generally necessary or praiseworthy institution, it is clear that what the respondent did here was exactly what the law permitted it to do, and no more. The strike was an economic strike. Respondent was guilty of no unfair labor practice. It hired permanent replacements out of necessity to save the plant from complete destruction, not simply as a convenience or to avoid loss of profits. The only way it could get replacements was to assure them of job tenure, and because of the depressed business conditions and the already hopeless layoff list of people with seniority, the only way it could keep its lawful promise was to either give the replacements some form of additional seniority or agree on some other arrangement with the Union. The Union refused to consider any arrangement that would permit the replacements to remain. Thus in this case the policy of additional seniority for replacements was purely and simply the necessary implementation of the right to operate the plant during a strike and to hire permanent replacements, both of which are rights conceded by all to exist.

ARGUMENT

I.

The sole question in this case is whether or not the Board properly declared what it calls "superseniority" per se unlawful.

The issue in this case is a narrow one. Simply stated, it is whether or not the act of granting additional seniority to replacements for economic strikers is *per se* a violation of Sections 8(a)(1) and 8(a)(3) of the Act.

Before the Court of Appeals the Board advanced the argument that under the decision in *Radio Officers Union v. National Labor Relations Board,* 347 U.S. 17 (1954) motive of the employer is irrelevant in a case involving the alleged violation of Section 8(a)(3).

The argument that the Board's decision was correct because it was simply balancing conflicting interests is advanced for the first time before the Supreme Court. The Board's opinion says nothing of balancing, nor does the Board's Brief in the Court of Appeals.

However, we shall deal with these arguments presently. Whether either or both be used, it is abundantly clear that the Board's decision was that additional seniority, which it calls "superseniority", is absolutely unlawful, and that the Board will consider no defense whatsoever in such a case.

The Board has been understandably reluctant to use the words *per se.* In the world of labor-management relations they have an alien ring, for, as experts must know, this is a world of shades of gray in which rarely, if ever, can any position be said to be all black or all white.

Of course, no provision of the Act specifically prohibits the grant of additional seniority to replacements or anyone else.

When the Board decided to impose the prohibition, it selected Erie Resistor as its guinea pig. As we shall show, at the very moment Erie Resistor was being prosecuted for what the Board now describes as an obvious violation of the Act, other employers who did exactly the same thing were not even required to answer a complaint.

Erie Resistor, a small company trying to survive in a bitterly competitive field, had conscientiously lived up to the letter and spirit of the law as announced in the decisions of the courts. It had taken fearful punishment in a long strike, and had not recovered.

As a reward for conscientious observance of the law, this small plant was selected by the Board as the vehicle for establishment of the doctrine that the grant of any additional seniority to replacements of economic strikers is *per se* unlawful, and that no defense, however meritorious; no circumstances, however compelling; no decent and honorable behavior; no compliance with legal and moral obligations, however solidly proven; and no provocation or violation by the other party of legal and human rights, however flagrant, would even be considered by the Board.

This selection was deliberate. At the very outset of the hearing, Counsel for the General Counsel said:

> "Paragraph 9 of the Complaint alleges the promulgation of a seniority policy which deprived employees of their seniority status.

"The Trial Examiner may note that the motivation for this seniority policy is not alleged in Paragraph 9. The reason is that this paragraph is directed towards what is referred to as the per se superseniority docket, (sic) Potlatch Forest, an early Board case.

"I might add this allegation of the complaint is included specifically at the direction of the General Counsel which wants to bring this doctrine before the National Labor Relations Board for review. It is the only case in which the per se doctrine has been exposed to a ruling." (R. 80a).

At the very time[3] Erie Resistor was being tried on the theory that superseniority for replacements was *per se* illegal, the General Counsel issued a ruling in Case No. SR-509 on identical facts as follows:

"The General Counsel concluded that further proceedings were unwarranted. The evidence, when viewed in its entirety, supported the finding that the company had promised the replacements superseniority in order to staff its plant during the strike, rather than as a retaliatory measure to punish the strikers. In these particular circumstances, insufficient basis was deemed to exist for a finding that the company's conduct in this respect or its action in reinstating only those strikers who had not been permanently replaced prior to their unconditional offer to return to work, constitute unfair labor practices. *N.L.R.B. v. Mackay Radio & Telegraph Company,* 304 U.S. 333, 345-6; cf. *Mathieson Chemical Corporation,* 114 N.L.R.B. 486, 487."

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3. The Complaint against Erie Resistor was issued April 7, 1960. SR-509 was released on June 27, 1960.

Perhaps under the law the Board is permitted to select victims when it wants to change its rules or establish some extreme principle. Perhaps labor cases can be treated as though they were some sort of laboratory experiment or some academic subject for philosophical discussion.

However, the very existence of this small plant is threatened by the enormous amount of money demanded by the Board as the price for establishing its *per se* rule. This plant is owned and managed by human beings, and it employs human beings, both replacements and former strikers, whose livelihood is threatened, not guinea pigs.

If they are to be condemned without a chance to have their defense given consideration, it should not be on the pretext that this is not a *per se* doctrine.

The complaint was issued on the *per se* theory. All other issues were eliminated after the hearing, the Trial Examiner's findings and report, and the Board's decision. The Trial Examiner, following the decisions of the courts, rejected the *per se* theory. The Board reversed the Trial Examiner and adopted the *per se* doctrine. The Court of Appeals reversed, rejecting the *per se* theory.

This was the only issue before the Court of Appeals, and it is the only issue before the Supreme Court.

II.

The Board erred in declaring that a preferential seniority plan for replacements is per se unlawful.

The issue before the Circuit Court was whether or not any and every grant of additional seniority to economic strikers is *per se* unlawful, regardless of its extent, purpose, or surrounding circumstances.

Thus the question is not whether under the facts of this case—facts which the Board admits it ignored—adoption of a policy of additional seniority violated Sections 8(a) (1) and 8(a) (3), but whether under any conceivable set of facts an employer can grant additional seniority to replacements without violating the law.

The Court of Appeals properly refused to endorse such extreme administrative legislation.

(a) The fact that some action by an employer or union foreseeably or inevitably interferes with some protected activity or encourages or discourages union activity does not of itself render it unlawful.

One of the basic principles of the federal law governing labor relations is that an employer may operate his plant while his employees are on strike, whether it be an economic strike or an unfair labor practice strike.

This is not and has not been disputed by anyone, even though the Act does not grant this right specifically.

A second and equally basic principle is that, absent unfair labor practices, an employer may hire permanent replacements for economic strikers. As is true of the

right to operate during a strike, this right, or "privilege" as the Board calls it, is not specifically granted in the Act. The existence of this right was recognized in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). There the Court said:

> "* * * Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although Section 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. * * *"

This right to hire and retain replacements has been recognized by the Board, the Courts, and Congress from the day it was announced. The Board concedes that the right exists. (R. 11a-12a).

Nevertheless, operation of the plant during a strike certainly interferes with the effectiveness of the strike. It certainly discourages union membership and activity.

If, as frequently happens, some employees join in the strike and some do not, the union is divided into two camps, and even though the employer knows or must foresee that by permitting employees to work while others are striking he is discouraging union activity or membership, no one has ever claimed that he must discharge or lay off those employees who want to work.

In this very case the Board found no unfair labor practice until May 29, yet prior to that date the employer operated his plant by using 140 clerks, supervisors and engineers, 33 replacements and four former strikers. (R. 4a-5a). Thus the Board in this case has held that the fact that the action by the employer interfered with the effectiveness of the strike or discouraged union activity or membership does not of itself render it unlawful.

It is equally plain that permanently replacing economic strikers inherently interferes with the effectiveness of a strike and discourages union activity. If, as sometimes happens, all the strikers are permanently replaced, not only is the strike broken, but the union, so far as that plant is concerned, is destroyed.

Nevertheless, in this case, as in hundreds of others, the Board recognized that this did not of itself render the hiring of replacements unlawful, for it found no unfair labor practice prior to May 29, although prior to that time it found that 33 permanent replacements had been hired and were working. (R. 5a).

The Board's own decision in the very case at bar refutes its major premise.

(b) The Board's function of balancing conflicting interests does not extend to writing into the act prohibitions that it does not already contain.

Authority for absolute proscription of the granting of additional seniority is claimed to exist because this Court has said that the Board may balance conflicting economic interests. *National Labor Relations Board v. Truck Drivers, Local No. 449*, 353 U.S. 87 (1957).

That case involved a lockout by the non-struck employers of an employers' association, and was but one of a great number of cases involving charges that lockouts were violations of Sections 8(a)(1) and 8(a)(3).

In this connection, it should first be noted that a lockout foreseeably and inherently interferes with the right to strike, and most assuredly discourages union membership and activity. If the Board's theory were correct, it would follow that the Board and the Courts would have declared all lockouts illegal *per se*, but this is not the case.

On the contrary, as Mr. Justice Brennan said in the case upon which the Board relies:

> "Although * * * there is no express provision in the law either prohibiting or authorizing the lockout, the Act does not make the lockout unlawful *per se*. * * *"

This is most certainly not authority for the proposition that the Board could hold that all lockouts are *per se* unlawful.

The "balancing" spoken of in that case refers neither to absolute prohibition of lockouts nor to their

absolute authorization. Instead it approves the Board's practice of examining the facts in each such case, and where economic hardship is shown[4] or where substantial practical collective bargaining problems are involved, of making its decision on the facts found in that case.

As Mr. Justice Brennan put it:

> "The Court of Appeals recognized that *the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown.* The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship. We hold that *in the circumstances of this case* the Board correctly balanced the conflicting interests in deciding that a temporary lockout to preserve the multi-employer bargaining basis from the disintegration threatened by the Union's strike action was lawful." (Emphasis Supplied)

The Board's refusal, in cases involving job assurance or additional seniority, to recognize the possibility that in some case economic hardship or need might justify a grant of additional seniority,[5] or that in some

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4. See, e.g., *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268; *International Shoe Co.*, 93 N.L.R.B. 907; *Duluth Bottling Association*, 48 N.L.R.B. 1335.

5. The Board's proposition is based upon the assumption that motive is irrelevant in such cases. (Board's Brief, p. 19). Thus where motive is relevant, and as we claim, of controlling importance, there is no authority for "balancing" conflicting interests case by case or any other way.

We have never conceded any intent to discriminate, but have proved instead that the employer's sole purpose was lawful and non-discriminatory.

case the realities of collective bargaining in a particular situation might require such action, is not balancing. It is legislation by the Board.

We have not sought, and we do not seek, a ruling that a grant of additional seniority to replacements is absolutely privileged, nor did the Court of Appeals make such a decision.

We do claim that the Board abuses its powers, and in effect abdicates its responsibility, when it outlaws an entire course of conduct without examining the facts and balancing the interests, if necessary, in each case.

This tendency to short-cut decisions is precisely what resulted in reversal of the Board's decision in *National Labor Relations Board v. Insurance Agents International Union,* 361 U.S. 477 (1960). Speaking for the Court, Mr. Justice Brennan said:

> "Thus the Board's view is that irrespective of the union's good faith in conferring with the employer at the bargaining table for the purpose and with the desire of reaching agreement on contract terms, its tactics during the course of the negotiations constituted *per se* a violation of §8(b) (3). * * *"
>
> * * * * * * *
>
> "The use of economic pressure, as we have indicated, is of itself not at all inconsistent with the duty of bargaining in good faith. But in three cases in recent years, the Board has assumed the power to label particular union economic weapons inconsistent with that duty. See the *Personal Products* case, *supra,* 108 N.L.R.B. 743, set aside, 97 U.S. App. D.C. 35, 227 F. 2d 409; the *Boone County* case,

United Mine Workers, 117 N.L.R.B. 1095, set aside, 103 U.S. App. D.C. 209, 257 F. 2d 211; * * *"

* * * * * * *

"It is one thing to say that the Board has been afforded flexibility to determine, for example, whether an employer's disciplinary action taken against specific workers is permissible or not, or whether a party's conduct at the bargaining table evidences a real desire to come into agreement. The statute in such areas clearly poses the problem to the Board for its solution. Cf. *Labor Board v. Truck Drivers' Union*, 353 U.S. 87. And, specifically we do not mean to question in any way the Board's powers to determine the latter question, *drawing inferences from the conduct of the parties as a whole. It is quite another matter, however, to say that the Board has been afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful.* * * *"* (Emphasis Supplied)

The nature of the action taken by the respondent in that case was also said by the Board to justify the Board's *per se* rule, but, as the Court said:

"It may be that the tactics used here justify condemnation, but this would not justify attempting to pour that condemnation into a vessel not designed to hold it."[6]

6. The Court quoted a concise statement by Archibald Cox, found in 71 *Harvard Law Review* 1401, 1437: "To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition."

The argument that these tactics gave one party an undue advantage in bargaining was disposed of by the Court in the following statement:

> "* * * Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them. The catalog of union and employer weapons that might thus fall under ban would be most extensive."

In a separate opinion written by Mr. Justice Frankfurter, the following pertinent comment appears:

> "The Board urges that this Court has approved its enforcement of § 8(b)(3) by the outlawry of conduct *per se*, and without regard to ascertainment of a state of mind. It relies upon four cases: *H. J. Heinz Co. v. Labor Board*, 311 U.S. 514; *Labor Board v. Compton-Highland Mills*, 337 U.S. 217; *Labor Board v. F. W. Woolworth Co.*, 352 U.S. 938; and *Labor Board v. Borg-Warner Corp.*, 356 U.S. 342.
>
> * * * * * * *
>
> "* * * To the extent that in any of these cases language referred to a *per se* proscription of conduct it was *in relation to facts strongly indicating a lack of a sincere desire to reach agreement.*" (Emphasis Supplied)

More recently, in *Teamsters Local 357 v. National Labor Relations Board*, 365 U.S. 667 (1961), Mr. Justice Douglas, speaking for the Court in rejecting a *per se* rule observed:

> "There being no express ban of hiring halls in any provisions of the Act, those who add one,

whether it be the Board or the courts, engage in a legislative act."

Additional seniority, or as the Board calls it, super-seniority, is not expressly banned by the Act. When, as here, the Board imposes an absolute prohibition, it is clearly engaging in a legislative act.

(c) Under existing decisions of the courts of appeal the Board needs no per se rule to amply protect the legitimate interests of all concerned.

The Board urges, in effect, that unless it is permitted to adopt this *per se* doctrine it will be powerless to protect the rights of employees under Sections 7 and 13 of the Act.

Nothing could be further from the truth. In the cases in which the Board exercised its fact finding and discretionary powers, considering the whole record, its orders were enforced.

Only when the Board relied upon its *per se* doctrine was enforcement refused. The first such case was *National Labor Relations Board v. Potlatch Forests, Inc.*, 189 F. 2d 82 (9th Cir., 1951).

In the cases that followed the Board did not attempt to apply the *per se* theory, but investigated all the circumstances to discover whether the genuine or true purpose of the employer was to protect and preserve his business or simply to punish employees for striking.

In *N.L.R.B. v. California Date Growers Ass'n.*, 259 F. 2d 587 (1958), the Court of Appeals for the Ninth

Circuit reviewed a decision of the Board that an employer was guilty of an unfair labor practice when he granted non-striking employees and replacements additional seniority. The Board's decision was based on its finding of fact that this additional seniority was not granted, or even decided upon, during the strike, was not communicated to personnel until long after the strike had ended, and thus was designed to punish the strikers, not preserve the business.

The Court said:

"Respondent contends, however, that it was not a violation of the Act for it to replace the strikers with new employees in order to continue its business during the strike, *N.L.R.B. v Mackay Radio and Telegraph Co.*, 304 U.S. 333; further, that it was proper to give those employees hired during the strike an assurance that their employment would not be terminated by the return of the strikers and hence, a layoff and hiring policy designed to implement these assurances was proper and not unfair labor practice. *N.L.R.B. v. Potlatch Forests*, 189 F. 2d 82.

"*Mackay Radio, supra* and *Potlatch, supra*, indicate that *without doubt the actions taken by Respondent in the instant case do not constitute unfair labor practices in and of themselves. Such actions in particular situations may be perfectly permissible within the Act.* The *motive* of the employer in carrying out these actions becomes the controlling factor. *Olin Mathieson v. N.L.R.B., supra; N.L.R.B. v. Potlatch, supra; Labor Board v. Jones*

& Laughlin, 301 U.S. 1, 45-46." (Emphasis Supplied)

In 1960 the same Court refused enforcement of the Board's order in *Pittsburgh-Des Moines Steel Co. v. N.L.R.B.*, 284 F. 2d 74. That case did not involve so-called superseniority directly, but it did involve the charge that the respondent company had unlawfully discriminated against strikers by calculation of a bonus in a manner that eliminated payments to employees who had engaged in a strike while paying the bonus to employees who had not been on strike.

The Board in that case relied, as it does here, upon *Radio Officers Union v. N.L.R.B.*, 347 U.S. 17 (1954) as authority for the proposition that because such a bonus calculation necessarily interfered with and discouraged strikes, and discriminated between employees on the basis of their participation in a strike, it was *per se* illegal.

The Court in rejecting this theory reaffirmed its statements in *Potlatch* and *California Date Growers*, saying:

> "That protected union activity is the direct cause of a business condition upon which an employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity. An employer may hire permanent replacements for economic strikers even though the business condition —a lack of manpower—which impels the employer to act was directly caused by the strike. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). Discussion in *Olin Mathieson Chemical*

Corp., v. N.L.R.B., 232 F. 2d 158 (4th Cir., 1956), affirmed per curiam, 352 U.S. 1020 (1957) and in *N.L.R.B. v. California Date Growers Association*, 259 F. 2d 587 (9th Cir., 1958), indicates that when in order to obtain replacements for economic strikers it is necessary for an employer to promise seniority to the replacements, the denial of seniority status to those strikers who are reinstated is not an unfair labor practice, although the business condition which actuated the employer to deny seniority status to reinstated strikers was directly caused by the strike itself. * * *"

In 1956, the Court of Appeals for the Fourth Circuit decided *Olin Mathieson Chemical Corporation v. N.L.R.B.*, 232 F. 2d 158. As the Ninth Circuit Court observed, this case involved a grant of so-called superseniority to non-strikers *after* the strike was over. Circuit Judge Dobie, in discussing the grant of "superseniority," said:

"* * * With a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacements save upon a promise of permanent tenure, to promise such tenure, to the replacements."

The key to the Court's reasoning is found in the following statement of facts:

"* * * The strike was over, the strikers had returned to work. The Olin plant was in full operation. No promise, when they were employed, was made to the employees who remained at work during the strike, or who had returned to work before the

end of the strike, that their employment would be permanent. Olin, *after the strike, when there was no necessity for such action to keep its plants in operation,* promulgated its superseniority policy in favor of the so-called 'loyal employees' and against those who returned to work after the strike had failed and was over. Olin was clearly penalizing the strikers for exercising their right to strike and was thereby clearly discouraging any exercise of this right in the future. * * *" (Emphasis Supplied)

The decision was affirmed by the Supreme Court *per curiam,* at 352 U.S. 1020 (1957).

In 1960 the Court of Appeals for the Sixth Circuit in a so-called superseniority case, *Ballas Egg Products v. N.L.R.B.,* 283 F. 2d 871, said:

"* * * the petitioner's motivation in adopting, maintaining and utilizing its superseniority policy was impelled by anti-union considerations rather than by any economic interest of its own; * * *"

On this basis, and on the authority of *California Date Growers* and *Olin Mathieson,* the Court enforced the Board's order in a three-paragraph decision. The question of illegality of superseniority *per se* was not raised before the Board or the Court.

In December, 1960, the Court of Appeals for the Seventh Circuit handed down its decision in *N.L.R.B. v. Lewin-Mathes,* 285 F. 2d 329. Of course the Board would have it appear that superseniority was not considered by the Court (R. 10a, n. 13), but in the Court's resume of the facts, the following appears:

"* * * the men (replacements) were granted superseniority over any of the strikers that would return. There were 7 men who reported for work as replacements. On June 6 a meeting was had between United (the striking Union) and Respondent. * * * They were advised that the replacements * * * had been granted superseniority. * * * The parties discussed a superseniority clause for the replacements. * * * Respondent insisted that United would have to represent the replacements and insisted further that there would have to be a clause providing for superseniority for the replacements. United stated that it could not negotiate a contract which recognized the replacements."

Later in the opinion, the following appears:

"The difficulty in the way of reaching an agreement between the parties was the insistence on the one hand of the Union to full jurisdiction and seniority rights within its unit and *the insistence of the Company* on the other of management rights with respect to assignment of work and, later, after the strike began, *its right to protect the replacements who had been hired during the strike by giving them the seniority and assurances which had been promised to them before they undertook to replace the strikers.* * * * " (Emphasis Supplied)

The Court rejected the Board's finding that the respondent had refused to bargain in good faith, and said in refusing enforcement:

"Having found that the strikers were not unfair labor practice strikers it would necessarily follow

that *the strikers were economic strikers in which case it would be lawful and proper to grant superseniority to replacements and we so hold.*" (Emphasis Supplied)

Thus, of the four Courts of Appeal which prior to *Erie Resistor* had occasion to pass upon superseniority for replacements, the Ninth Circuit Court on three separate occasions rejected the *per se* theory. The Fourth Circuit Court indicated clearly that it did not consider superseniority for replacements illegal *per se*. The Seventh Circuit Court specifically held that superseniority for replacements is lawful. The Sixth Circuit Court held, as did the Ninth and Fourth, that the controlling question that must be answered is whether superseniority for replacements was impelled by anti-union considerations rather than by the employer's own legitimate economic interest.

The Board argues that the recent decision of the Court of Appeals in *Swarco, Inc. v. National Labor Relations Board*, 303 F. 2d 668 (6th Cir., 1962), petition for certiorari pending, No. 335 October Term, 1962, is in conflict with the decision of the Court of Appeals in the instant case, but the opinion in that case indicates no approval of a *per se* theory.

As the Trial Examiner found, the additional seniority was granted by Erie Resistor because it had to hire replacements to survive, it could not get replacements without an assurance of tenure, and it could not make and keep such a promise without some form of seniority beyond the hiring date of the replacements or, alternatively, some other agreement with the Union that they could remain, which the Union refused.

Erie Resistor's sole purpose was to get enough replacements to survive. It is true that any striker who chose voluntarily to return received the same treatment, but this was purely incidental, for as the Board observes: "This is doubtless due to the fact that, if any bargaining unit employees are willing to go to work during a strike, the employer, as a practical matter, cannot place them in a worse position than newly hired employees." (Board's Brief, p. 24, n. 15).

Swarco did not offer additional seniority to replacements at all, but used superseniority solely to induce strikers to abandon the strike. Whether this was or was not a violation of the law need not be decided here, for it is not the same case and the Board might well arrive at a different conclusion if it considered the facts of each case instead of relying upon a broad and absolute prohibition. Clearly the defense that it was necessary to obtain permanent replacements and to keep a lawful promise of tenure to them could not apply in *Swarco*.

Statements in Judge Cecil's opinion indicate that the Court would have reached a different conclusion had the respondent granted superseniority to replacements rather than restricting it to strikers who abandoned the strike. For example, he says (p. 671):

> "The facts of this case do not bring it within the ambit of the *Mackay*[7] case."

Then, a little later in the opinion, in discussing *N.L.R.B. v. Lewin-Mathes Co., supra*, he says (p. 672):

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7. *N.L.R.B. v. Mackay Radio & Telegraph Co., supra.*

"The court found that the strikers were economic strikers and that in such case it was lawful to grant superseniority to replacements. This is in accord with the rule announced in *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, at 345, 346.

* * * * * * *

"From a review of these cases involving superseniority, we find that the question of violation of section 8(a) (1) and (3) of the Act, by reason of granting superseniority, is a question of fact. *Each case must be decided on its own particular facts.*" (Emphasis Supplied)

These statements are entirely inconsistent with the suggestion that the Court of Appeals was approving the *per se* doctrine. Instead, it seems clear that the Court was satisfied that where "superseniority" is granted to *replacements* for economic strikers, this is lawful under the rule in *Mackay Radio*.

Indeed the ruling of the Court of Appeals in *Lewin-Mathes*, if it be read literally, recognizes an absolute privilege to grant superseniority to such replacements.

This absolute privilege is the windmill against which the Board tilts in the instant case, but it is not the issue, for the Court of Appeals here did not so hold.

On the contrary, the Court of Appeals here recognized all the restrictions imposed by the statute and the precedents developed over the past years.

III.

The purpose or motive of the employer is of critical importance in every case involving an alleged violation of Section 8(a)(3).

The Board argues that under Sections 8(a)(1) and (3) of the National Labor Relations Act[8] there are two types of cases. The first type is said to be cases involving "normal business conduct", such as granting wage increases, reducing wages, laying off an extra shift, or shutting down a plant. In such cases the Board admits motive is relevant. (Board's Brief, pp. 16-18).

For some reason, the Board avoids mentioning discharge of union adherents in its catalog of cases of this type, although they are perhaps the most prolific source of litigation under Section 8(a)(3). The established rule is that in such cases the Board has the burden of proving affirmatively and by substantial evidence that the employer's motive was to interfere with rights guaranteed by Section 7 and to discriminate because of membership or non-membership in the union. There is no inference of illegal motive simply by reason of the discharge. *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

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8. In the instant case, the alleged violation of Section 8(a)(1) is based entirely upon the alleged violation of Section 8(a)(3). General Counsel expressly disclaimed any allegation of independent violation of Section 8(a)(1). As is true of the Section 8(a)(5) charge (Board's Brief, p. 2, n. 1), in this particular case unless the employer, by adopting the policy of job tenure for replacements by means of additional seniority is *per se* guilty of violation of Section 8(a)(3), no violation of Section 8(a)(1) has been alleged or shown to exist.

The second type of case, of which the Board says there are "many instances"[9] is said to be that in which the employer's motive is "irrelevant because he has singled out union membership or activity and imposed coercion or restraints thereon which so impair employees' rights that, on balance, the action cannot be justified by its ultimate business purpose." (Board's Brief, p. 17).

In plain words, we judge this to mean that if the Board considers some behavior bad enough, it can declare it *per se* invalid and refuse to consider any defense.

The decision of the Supreme Court in *Republic Aviation Co. v. National Labor Relations Board*, 324 U.S. 793 (1945) is cited as authority for this proposition. That case involved wearing of union buttons in the plant, solicitation of members on plant property during non-working hours, and prohibition of distribution of literature in the company parking lot.

If the Board's contention is correct, any employer who did any of these things must *per se* be guilty of violating the law.

That has not been the case. Instead these rules and prohibitions have been considered case by case, and the

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9. Only two cases are cited. *National Labor Relations Board v. Star Publishing Co.*, 97 F. 2d 465 (9th Cir.) was decided in 1938. The Ninth Circuit on three occasions since then has refused to apply this alleged rule. *Republic Aviation Co. v. National Labor Relations Board, infra,* and similar cases representing an abuse of expertise by the Board resulted in amendments to Sections 10(c) and 10(e) of the Act intended, as Congress said, " * * * to preclude such decisions as those in *N.L.R.B. v. Nevada Consol. Copper Corp.*, (316 U.S. 105)

business needs and purposes, if genuine and substantial, have been recognized as proof of lawful motive.[10]

The Board's indiscriminate or *per se* application of its rule was rejected, and the Board required to examine the facts and circumstances, in *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). In that case, Mr. Justice Reed, speaking for the Court, referred to the Court's earlier ruling, saying:

> "* * * No restriction may be placed on the employees' right to discuss self-organization among themselves, *unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 803.* * *" (Emphasis Supplied)

Thus, the Court has recognized that under *Republic Aviation* a legitimate business purpose justifies an action which, absent such a purpose, could be held violative of the Act.

The Board's attempt to place all labor cases into one or the other of two categories is both an oversimplification of the complex field of regulation of labor-management relations and an attempt by the Board to escape the duties imposed upon it by the law.

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and in the *Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic Aviation*, and *LeTourneau*, etc., cases * * *." Among other things, it was said: "The language also precludes the substitution of expertness for evidence in making decisions." House Conference Report No. 510, 80th Cong., 1st Sess., *Legislative History of the Labor Management Relations Act*, 1947 (U.S. Govt. Prtg. Office, 1948); Volume I, page 560.

10. See, e.g., *Tabin-Picker & Co.*, 50 N.L.R.B. 928 (1943); *North American Aviation, Inc.*, 56 N.L.R.B. 959; *Stuart F. Cooper Co.*, 136 N.L.R.B. No. 8 (March, 1962).

The key to its attempted establishment of these two categories is found in the words "which so impair employee rights that, *on balance*, the action cannot be justified." (Emphasis Supplied) (Board's Brief, p. 17). In such cases the Board says motive is completely irrelevant, and the doing of the act *per se* condemns the actor.

The significance of this statement is that the Board has delegated to itself the authority to decide when it will or will not consider motivation or purpose relevant, which is the alleged "balancing" we have discussed.

Truly the categories of employer or union activities that might thus be absolutely prohibited would be extensive. A host of such activities which either interfere with some protected activity or encourage or discourage union membership readily comes to mind, but they have not yet been declared *per se* unlawful by the Board, or, if they have, the Courts have reversed the declaration.[11]

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11. A few examples are as follows: Discharge of union adherents, *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Noritake Co., Inc.*, 139 N.L.R.B. No. 62 (Nov. 1, 1962); granting superseniority to union officers, *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949); replacement of economic strikers, *Mackay Radio & Telegraph Co. v. National Labor Relations Board, supra;* agreeing to preferential seniority for one group as opposed to another group, *National Labor Relations Board v. Wheland Co.*, 271 F. 2d 122 (6th Cir., 1959); lockouts, *Building Contractors Assn. of Rockford, Inc.*, 138 N.L.R.B. No. 143 (October 5, 1962); elimination of an Easter bonus for union workers while continuing it for non-union workers, *Speidel Corporation*, 120 N.L.R.B. 733 (1958); shutting down a plant, *National Labor Relations Board v. Lassing*, 284 F. 2d 781 (6th Cir., 1960) cert. den. 366 U.S. 909; *National Labor Relations Board v.*

In support of its assumption to declare all additional seniority unlawful, the Board relies upon the decision in *Radio Officers v. National Labor Relations Board,* 347 U.S. 17 (1954) and the companion cases decided that same day, but this is a distortion of the holding in those cases. As Mr. Justice Douglas said in discussing *Radio Officers* in *Local 357, Teamsters Union v. National Labor Relations Board,* 365 U.S. 667 (1961):

> "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test."

It seems almost incomprehensible that the Board should read into this language authority to completely disregard the true purpose or real motive, but that is what is has done in this case.

The Board's decision in the instant case is not based upon any inference that the respondent's purpose or motive was to interfere with a protected activity or to encourage or discourage union membership. On the contrary, conceding a lawful motive, the Board says that it is completely irrelevant, and refuses to consider it.

As Circuit Judge Smith's opinion clearly shows, that was the basis for refusing enforcement. (Circuit Court Proceedings, pp. 17, 20, 21).

Rapid Bindery, Inc., 293 F. 2d 170 (2nd Cir., 1961); elimination of jobs in the bargaining unit, *Puerto Rico Gas and Coke Company,* 124 N.L.R.B. 489 (1959); *Waynesboro Knitting Co.*, 90 N.L.R.B. 113 (1950); subcontracting work, *Motoresearch Company and Kems Corporation,* 138 N.L.R.B. No. 145 (October 9, 1962); harassing strikes, *Insurance Agents International Union v. National Labor Relations Board,* 361 U.S. 477 (1960).

The opinion in *Radio Officers* specifically affirms the rule that motivation is relevant in the following words:

> "The relevance of the motivation of the employer has been consistently recognized under both 8(a)(3) and its predecessor. * * *
>
> "That Congress intended the employer's purpose in discriminating to be controlling is clear."

The Court goes on to say that in cases where the foreseeable result is encouragement (or presumably discouragement) of union membership, the Board need not introduce "*independent* proof that encouragement of Union membership actually occurred", but that it was "eminently reasonable for the Board to infer encouragement of Union membership" from the facts on the record in that case. (Emphasis Supplied). The Court of Appeals in the instant case recognized the Board's right to draw inferences but not to disregard evidence rebutting such an inference. (Circuit Court Proceedings, p. 20, n. 6).

Neither *Radio Officers* nor any other case holds that no evidence may be submitted to rebut such an inference. On the contrary, in *Radio Officers*, Mr. Justice Frankfurter wrote a concurring opinion, in which Mr. Justice Burton and Mr. Justice Minton joined, summarizing his view of the effect of the Court's decision as follows:

> "In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. *But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence*

which may be adduced, and which the Board must take into consideration. * * *" (Emphasis Supplied)

Mr. Justice Black, joined by Mr. Justice Douglas, dissented from the opinion in *Gaynor*, saying:

"The plain and long accepted meaning of § 8 (a) (3) is that it forbids an employer to discriminate only when he does so *in order to* 'encourage or discourage' union membership. *Labor Board v. Waterman S.S. Co.*, 309 U.S. 206, 219. * * *

* * * * * * *

"* * * there was no finding that either employer's discrimination occurred *in order* to encourage union membership. For the reasons set out in my discussion of § 8(a) (3) in the *Gaynor* case, I think these findings fall short of showing an employer 'violation of § 8(a) (3).' * * *"

We submit that the views of the dissenting Justices are consistent with justice, Congressional intent, and effective and impartial administration of the Act, and that the Board should not be permitted to draw an inference of unlawful motive simply because the Board considers that some act or tactic encourages or discourages union membership or activity.[12]

Evidentiary facts sufficient to support a conclusion of unlawful motive are not in short supply if such a motive exists, as witness literally thousands of cases in which the Board has made such findings on such facts.

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12. Cf. *Sax v. National Labor Relations Board*, 171 F. 2d 769 (7th Cir., 1948).

However, assuming that the majority opinion in *Radio Officers* means that an inference may be drawn from the naked fact that an act was done, certainly, as the concurring opinion makes clear, this inference may be bolstered or rebutted by other evidence, which the Board must take into consideration.

There is not one word in any of these three opinions to support the proposition that motive is irrelevant. Instead, they make it clear that unlawful motive is an indispensable element of the alleged violation.

More recently, Mr. Justice Harlan, in a concurring opinion in which Mr. Justice Stewart joined, discussed the Board's efforts to use *Radio Officers* as authority for a *per se* rule to outlaw any hiring hall that did not meet its tests, said:

> "What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. * * *"
>
> *Teamsters Local 357 v. N.L.R.B.*, 365 U.S. 667, 677-685 (1961).

The Board struggles to rationalize its theory that in cases where the foreseeable result is encouragement or discouragement motive or purpose is irrelevant.

This is said (Board's Brief, p. 32) to be "consistent with the manifold expressions of courts and text writers asserting that the decisive question under Section 8(a)(3) is the 'real motive' for the employer's conduct."

The expression of just one of the text writers is worth noting.[13] He said:

> "The principle to be followed in the administration of Section 8(3) has never been in dispute. * * *
>
> * * * * * * *
>
> "* * * *The true purpose is the subject of investigation with full opportunity to show the facts.*"

The Board says its assertion that motive is irrelevant is consistent with these plain statements that it *is* controlling because "* * * further proof of a specific intent to encourage or discourage union membership is not necessary *after it appears that 'the employer intended to discriminate solely on the ground of such protected activity' or 'solely on union membership status'* * * *." (Board's Brief, p. 31). (Emphasis Supplied)

Of course, this begs the question, and does not meet the criticism by the Court of Appeals of the Board's *per se* theory.

This is no more than saying that as in cases in the Board's first category—say a discharge case—the Board need inquire no further if on substantial evidence in the record considered as a whole it finds that the employee was discharged solely because of his union membership or activity.

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13. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 *Harvard Law Review* 1, 20.

However, the Court of Appeals pointed out, as the Board now tacitly admits, that the Board must first find as a fact that this was the employer's intent.

Such an intent, motive or purpose was vigorously denied by the respondent, and the evidence produced satisfied the Trial Examiner that the employer's sole purpose was lawful.

The Board, however, seeks not only to infer the intent to encourage or discourage, but to support this inference by the further inference, based on its own judgment of the seriousness of the act, that the employer intended to discriminate solely on the basis of the protected activity. It would, in short, infer the basis for the first inference.

If we grant the authority to draw the second inference, the Board now seeks to go further and say that, depending on its judgment, it will consider or ignore at its option evidence offered to show that it was *not* the employer's intent to discriminate solely, or even partly, on the basis of union activity or membership.

The Board's analogy (Board's Brief, p. 15) illustrates this inference on inference. The Board says that a man who breaks a window and takes a ring in order to feed his starving children is guilty of a crime, notwithstanding his motive. Presumably the Board would inflict the maximum penalty for this crime, regardless of desperate need. That is not the point, although we would like to think that a Court, being concerned with justice, would take it into account.

The point is that under the law, stealing is a crime. Unless granting additional seniority to replacements is

per se a crime, which is the point at issue, inferring that the respondent intended to do what he did does not make it a crime. The suggestion that this is what the Courts mean by inference of motive or intent is unworthy of serious consideration.

The Board's whole argument in this case is that it must be impossible for the employer to have had any purpose or motive for granting additional seniority except to discriminate against strikers, because, according to the Board, that was the effect. The argument could be advanced as to every example we mentioned. It cannot stand in the face of proof to the contrary.

The fact is, as found by the Trial Examiner, the respondent's sole purpose in granting additional seniority was to obtain permanent replacements in order to operate his plant. This purpose is conceded to be lawful. Thus though it is clear that his "true purpose" and "real motive" have been proved by evidence to be lawful and not discriminatory, the Board would overcome this proof by an inference drawn from its own evaluation of the desirability of the conduct in question.

This drastic extension of the rule in *Radio Officers,* which is totally unnecessary to effective administration of the Act, would open the door to almost unlimited abuses which, as we have seen, may condemn either or both employer and union without any opportunity to present a defense.

The words of Mr. Justice Douglas in his dissent in *State of New York v. United States of America,* 342 U.S. 882 (1951) are prophetic. He said:

> "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

More recently in *Burlington Truck Lines, Inc. v. United States,* 31 U.S. L. Week 4023 (Nos. 27 and 28 decided December 3, 1962), Mr. Justice White said:

> "The agency must make findings that support its decision, and those findings must be supported by substantial evidence."

This seems little enough to ask of a board of experts who have the power of economic life or death over employers and unions.

IV.

The facts in this particular case bring it within the ambit of National Labor Relations Board v. Mackay Radio & Telegraph Co.

If, as we urge, the respondent is entitled to be judged on the facts in its own case and not required to defend every case in which an employer may have granted so-called "superseniority", those facts must satisfy any reasonable man that its action was well within the rule established in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Thus, the first requirement of *Mackay* is that the employer be guilty of no unfair labor practice. Absent *per se* illegality of its so-called "superseniority" policy,

Erie Resistor was found guilty of no unfair labor practice.

Next, the strike must be an economic strike. The Board found: "The strike was concedely economic in its inception * * *." (R. 3a).

Then there must be a hiring of permanent replacements, who may be assured of job tenure. The Board so found.[14]

14. The Board's counsel calls these replacements, who until at least May 29 were found by the Board to be lawfully hired (R. 22a), "strike breakers" and says they were promised "superseniority". (Board's Brief, p. 9). This is a distortion of the Board's findings, and an attempt by use of inflammatory words to prejudice the respondent. When Congress considered the right of an employer to hire replacements, the distinction between a lawful replacement and a "strikebreaker" was stated as follows:

> "The Board now says that an employer may replace an 'economic' striker, one who strikes for higher pay or other changes in working conditions. The bill writes this rule into the act, saying that a striker remains an 'employee' 'unless such individual has been replaced by a regular replacement'; and, at the end of the subsection, it defines a 'replacement' as being an individual who replaces a striker '*if the duration of his employment is not to be determined with reference to the existence or duration of such labor dispute.*' Thus 'strikebreakers' may not be regarded as 'replacements.'" (Emphasis Supplied)

House Report No. 245 on HR 3020, April 11, 1947, *Legislative History of the Labor Management Relations Act, 1947* (U.S. Govt. Prtg. Office, 1948), Volume I, page 202, at page 303.

Presumably because the principle of replacement of economic strikers was, and is, accepted by all, the final

However, when the strike began roughly half the work force was on layoff due to a decline in business and operations, the great majority, about 400 out of 450, having no reasonable expectation that they would be recalled. (R. 5a, 36a, 70a).

If the replacements were to remain after the strike as promised, some arrangement had to be made for them other than seniority from the date of hire; otherwise, they would have to go to the foot of the long layoff list, in which case they would have no prospect of employment.

The employer then did what we submit was in itself evidence of good faith and absence of any intent to discriminate. As the Board found:

> "In a bargaining session held May 11, Respondent informed the Union that it was promising replacements they would not be laid off as a result of settlement of the strike, and advised it that in order to implement this promise, it would have to accord the replacements some form of superseniority. Respondent offered to negotiate the details of a superseniority scheme for replacements." (R. 4a).

Thus on May 11, the first day replacements were hired and the problem thus became apparent, the respondent put the problem on the bargaining table for negotiation. (R. 4a).

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draft did not contain this specific provision, but it is clear that Congress recognized that permanence of tenure was the distinguishing feature between bona fide replacements and strikebreakers. (Senate Debates, 93 Cong. Rec. 4320-4321, *Ibid*, pp. 1102-1103).

Of course the Board calls this a proposal for "superseniority", perhaps because any arrangement that would permit the replacements to stay on after the strike necessarily would result in their stepping in ahead of those on layoff, and probably some strikers, for the business was hurt badly during the very first days of the strike[15] and it seemed certain that the pre-strike level of operations would not again be attained.

The Court of Appeals more accurately states the fact, saying "The Company offered to consider any plan acceptable to the Union, but the offer was rejected." (Circuit Court Proceedings, p. 16).

The Board ignores the undisputed fact that the respondent did not insist upon superseniority for replacements. It insisted only that some arrangement—any arrangement—be made that would permit them to stay at work after the strike ended. (R. 150a, 156a, 225a-227a, 442a-443a, 146a-147a, 124a, 165a, 161a, 159a, 343a).

At five bargaining meetings between May 11 and May 28, the Company proposed several alternative plans, but, as the Board found: "The Union, however, remained adamant in its opposition to superseniority, contending that all strikers would have to be reinstated and the replacements terminated." (R. 5a).

The evidence shows, and the Trial Examiner found, that without some form of "superseniority" the em-

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15. The biggest electronic component customer cancelled all its orders, the biggest plastics customer removed its tools and dies, and intense pressure was applied by the customers that remained. (R. 425a, 450a-451a).

ployer could not get replacements to come to work. (R. 61a).

We reiterate that to this point the Board found nothing unlawful in respondent's conduct, which was certainly within the rule in *Mackay Radio.*

Then on May 27 the so-called 20-year plan was formulated, based on a projection of what the work force would be after the strike. (R. 5a, n. 2).

On May 28, respondent, according to the Board, "informed the Union that it had settled on the 20-year superseniority plan. However, this plan was not publicized until June 10, and was claimed to be 'confidential' until then." (R. 6a).

Still the Board found nothing unlawful in respondent's conduct through May 28.

Then, while the Company treated the plan, which was really another proposal for bargaining, as confidential, the Union brought it up at a membership meeting on May 29, and broadcast it all over Erie over television. (R. 6a).

At this point, according to the Board, the strike became an unfair labor practice strike for the first time. (R. 21a-22a).

Although the Company, after four more fruitless meetings (General Counsel's Exhibit 2, R. 543a), finally announced on June 10 adoption of the plan it has proposed to the Union on May 28, it still offered to bargain on any alternative. As Judge Smith observed, "Notwithstanding the formulation of a preferential seniority policy, the Company expressed a willingness to consider

any alternative plan proposed by the Union." (Circuit Court Proceedings, p. 16).

When the strike was over, the permanent replacements continued to work, and as many strikers as had not been replaced, and for whom there were jobs, were recalled. (R. 7a).

What this employer did is precisely what the Court in *Mackay Radio* indicated was permissible.

The only feature of this case that does not appear to be present in *Mackay Radio* is the employer's attempt to negotiate with the Union a solution to the problem that would confront them both at the end of the strike, when there would be more people than there would be jobs.

The seniority which the replacements or any other employees in the unit were to have was the subject of bargaining. While the respondent was admittedly flexible, offered to consider any plan, and proposed a number of solutions, the Union refused to bargain on the subject at all.

Faced with the Union's absolute refusal to recognize the replacements as employees, the respondent had to choose between discharging them at the end of the strike, thus dishonoring its lawful promise to them, or adopting as a matter of policy one of the seniority plans proposed to the Union.

The choice was not an easy one, but nevertheless respondent decided to honor its lawful promise to the replacements, while keeping open the door to negotiation that might settle the problem.

Judge Smith states the applicable principle, announced in *Mackay Radio,* concisely and well, as follows:

> "* * * We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer. We find nothing in the Act which proscribes such a policy. * * *" (Circuit Court Proceedings, p. 21).

The Board, however, substitutes innuendo for findings of fact supported by evidence, and paints a picture of what it considers to be the evils of superseniority generally without reference to the facts of the case before the Court.

For example, the term "20 years additional service" is repeatedly used by the Board as though the Board had found that this was unreasonable under the circumstances, but it did not. The Board refused to consider any of the circumstances.

Had it done so, it would have found that the undisputed evidence shows that the respondent was at all times willing to negotiate on seniority for the replacements, and also that respondent underestimated the damaging effects of the strike on future business, so that the twenty years proposed on May 28 and finally adopted as a policy proved little or no protection against subsequent layoff.

Another repeated erroneous statement, and one that seems strange coming from experts in labor rela-

tions, is that this seniority arrangement or any seniority arrangement is "permanent" Seniority is most certainly a subject for bargaining.[16] It is no more "permanent" than any other subject for bargaining. *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521 (1949).

There is no suggestion in the record that respondent was then or is now unwilling to bargain on seniority, but only that it would not agree to the sole proposal made by the Union, which was that all the replacements have no seniority and be discharged.

The Board also mentions that some 178 employees withdrew from Union membership following the strike. (Board's Brief, p. 28). The Union embellishes this with a statement which has no support of any kind in the record, which was rejected by the Trial Examiner (R. 47a-48a), and which was not found by the Board (R. 16a), to wit, that "* * * *at the instigation of the Re-*

16. The fact is that the Union on July 17, 1959 agreed with respondent as follows:

> "The Company's replacement and job assurance policy to be resolved by the NLRB and the Federal Courts and *to remain in effect pending final disposition.*" (Emphasis Supplied) (G.C. Ex. 27, R. 578a).

Other changes in seniority were agreed upon on July 17, 1959, including freezing of seniority for persons who transferred out of the bargaining unit (R. 303a-304a); revision of the operation of the seniority system (R. 306a, 308a); and superseniority for union officers (R. 317a, 318a). None of these other changes were challenged as being unlawful, probably because they were changes the Union wanted.

spondent, 173 members withdrew from the Union * * *." (Emphasis Supplied) (Union's Brief, p. 19). This is simply not true.

The Company and the Union agreed upon a maintenance of membership clause with an escape period up to August 1. It is undisputed that the Company did no more than make applications for membership and withdrawal cards equally available and explained the maintenance of membership clause. (R. 47a). The Company did not suggest to anyone that he join, withdraw, or refuse to join the Union, nor was there even an allegation that it did so.

In this connection, however, we suggest that the mass picketing, violence, attacks on employees' homes, terrorism, threats and abuse of employees, which respondent attempted to prove but which evidence in large part was rejected (R. 454a-455a, 556a, 457a, 461a-462a, 470a-472a, 480a-482a, 484a-486a, 502a-504a, 510a-518a, 557a), may well have disenchanted more people with the Union than anything respondent did or could have done.

This evidence should have been admitted, for as the Court said in *N.L.R.B. v. Hart Cotton Mills*, 190 F. 2d 964, 975 (4th Cir., 1951):

> "We do not mean to suggest by referring to the methods pursued in the effort to win the strike that unlawful or violent conduct on the part of employees on strike will condone unfair labor practices on the part of the employer. * * *
>
> "Nevertheless the acts of an employer when confronted by such an emergency cannot be ap-

praised without taking into account the whole situation. * * *"

Corrections of all the omissions and erroneous statements of fact contained in the Board's Brief and the Union's Brief can hardly be attempted here, nor should we be obliged to do so at this stage of the proceedings.

Nevertheless, no case can be decided in a vacuum, and suggestions of unlawful motive or unreasonable conduct if unchallenged may be as prejudicial as though they were findings of fact based on substantial evidence.

Upon the evidence in the record considered as a whole, and the findings of the Trial Examiner, which the Board could not in good conscience reverse, respondent was guilty of no unfair labor practice, affirmatively proved a legitimate motive and pressing economic need for its actions, and did only what *Mackay Radio*, and every decision on the subject since that time, permitted it to do. On these facts and findings the complaint should have been dismissed, as recommended by the Trial Examiner. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

Statute Involved

The relevant provisions of the *National Labor Relations Act*, as amended (61 Stat. 136, 29 U.S.C. §151 et seq.), in addition to those contained in the Brief of the National Labor Relations Board, are as follows:

[SEC. 10(c)—REDUCTION OF TESTIMONY TO WRITING: FINDINGS AND ORDERS OF BOARD]

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and *to take such affirmative action* including reinstatement of employees with or without back pay, *as will effectuate the policies of this Act*: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective

of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * *

[SEC. 10(e)—PETITION TO COURT FOR ENFORCEMENT OF ORDER; PROCEEDINGS; REVIEW OF JUDGMENT]

(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the

court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.